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July 10, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

William F. Caton,
Acting Secretary,
Federal Communications Commission,
1919 M Street, N.W., Room 222,
Washington, D.C. 20554.

Re: In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast Interests - MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry - MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy - MM Docket No. 87-154

Dear Mr. Caton:

On behalf of The Goldman Sachs Group, L.P., enclosed are an original and nine copies of Reply Comments of The Goldman Sachs Group, L.P. for filing in the above-captioned matter.

No. of Copies rec'd 0
List ABCDE

Please contact Patricia Diaz Dennis at (202) 956-7585 should you have any questions concerning this submission.

Respectfully submitted,

Patricia Diaz Dennis

Patricia Diaz Dennis

Attorneys for The Goldman Sachs Group, L.P.

(Enclosures)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

REPLY COMMENTS OF THE GOLDMAN SACHS GROUP, L.P.

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July 10, 1995

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Summary

Broadcasters' needs for capital are ever increasing. The Federal Communications Commission ("Commission" or "FCC") and commenters in this proceeding acknowledge that, faced with a burgeoning array of newer video distribution technologies, broadcasters must bid for programming and upgrade their facilities and transmission capabilities to remain competitive.

The FCC has historically tailored the attribution rules to reflect, among other factors, changes in the broadcast industry and in the availability of sources of investment capital. (Attribution NPRM at ¶ 6)[1/] The Goldman Sachs Group, L.P. (together with its subsidiaries, "Goldman") and other commenters support Commission proposals and advance other positions which involve "minimal risk of influence" and which, if not adopted, would "unduly restrict" investment capital in the broadcast industry. (Attribution NPRM at ¶ 5)

Overwhelmingly, if not exclusively, commenters in this proceeding support less restrictive attribution rules. Goldman joins in the comments advocating raising the

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1/ In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, Notice of Proposed Rule Making, MM Dockets Nos. 94-150, 92-51, and 87-154, FCC 94-324 (released January 12, 1995).

attribution benchmark for voting stock from five to 10 percent. In originally adopting the five percent benchmark, the Commission analogized to an inappropriate securities statute and should now align its voting stock attribution rule with the more analogous securities law benchmark of 10 percent. Other comments also urge the Commission to retain nonattribution of nonvoting stock and of debt holding, which Goldman likewise supports.

Goldman, in its comments, requested the FCC to clarify the insulation criteria for limited partners. It joins commenters who seek modifications of these criteria. However, Goldman also supports those commenters who propose making all limited partnership interests nonattributable and eliminating the insulation criteria altogether, or at least treating noninsulated limited partners no more restrictively than shareholders of a corporation. Assuming a distinction remains, Goldman supports the commenters who favor treating Limited Liability Companies ("LLCs") and Registered Limited Liability Partnerships ("RLLPs") for attribution purposes as limited partnerships, rather than corporations.

Should the Commission impose more restrictive attribution rules, despite the near uniform comments in opposition, they should apply prospectively only. Goldman also joins in the comment that attribution rules should not be tightened to offset any loosening of multiple ownership rules.

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REPLY COMMENTS OF THE GOLDMAN SACHS GROUP, L.P.

I.

Introduction

To be able to compete with an ever expanding array of video distribution technologies, broadcasters must have access to capital to bid for programming and develop state-of-the-art facilities and transmission capabilities. Because the Commission has always sought to update its rules to comport with present day market realities, it has appropriately requested comment on its attribution rules to decide what changes may be necessary to ensure that its attribution rules reflect today's broadcasting reality. In performing its task, the Commission should remain focused on the preeminent goal of its ownership rules which the attribution rules implement: to prevent a few from controlling or influencing the views of many by affecting broadcast content or concentrating ownership in the hands of a few. The Commission should adopt the changes to the attribution rules discussed below because they involve "minimal risk of influence" over broadcast content and will not adversely affect economic competition. Otherwise, broadcasters will be unduly restricted from accessing the capital markets.

II.

Relationship of Ownership Rules to Attribution Rules

Goldman agrees with CBS Inc. that, as an initial matter, any relaxation of ownership rules should not prompt a compensating tightening of attribution rules.[2/] The Commission itself recognizes that the two sets of rules are distinct. As stated in the Attribution Order[3/]:

> "[T]he attribution rules are the mechanical process of determining what constitutes an interest sufficient to affect the operations of the licensee. This determination is distinct from the determination of the number of outlets one party should operate to achieve the optimum level of diversity and competition."

2/ Comments of CBS Inc. ("CBS"), p. 2, n. 4.

3/ In the Matter of Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Report and Order, 97 F.C.C. 2d 997, 1011, (1984).

III.

Grandfathering Appropriate

Goldman agrees with the eight commenters[4/] who advocated that, should the Commission adopt more restrictive attribution rules, the changes should be prospective only. Goldman has relied on existing rules in making its present investments and would be unduly prejudiced if it were forced to divest investments because of new rules.

IV.

Limited Partner Insulation Criteria Elimination or Clarification

Goldman requested, in its comments, that the Commission clarify the attribution insulation criterion regarding the services a limited partner may perform for a media limited partnership. (Goldman Comments pp. 3-10). Five other commenters urged elimination or other clarification or revision to the insulation criteria.[5/] As

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[4/] Comments of Big Horn Communications, Inc. ("Big Horn"), p. 8; Comments of Capital Cities/ABC, Inc. ("Cap Cities/ABC"), pp. 19-20; CBS, p. 5; Comments of EZ Communications, Inc. ("EZ"), p. 5; Comments of Fox Television Stations, Inc. and Fox Broadcasting Company ("Fox"), p. 22; Comments to Notice of Proposed Rule Making by the Association of Independent Television Stations, Inc. ("INTV"), p. 3 n. 3; Comments of Silver King Communications, Inc. ("Silver King"), p. 9, n. 7; Comments of Westinghouse Broadcasting Company (Group W) ("Westinghouse"), pp. 8-10.

[5/] Cap Cities/ABC, pp. 9-12; Fox, pp. 17-22; Comments of the Freedom of Expression Foundation, Inc. ("Freedom of Expression"), pp. 10-12; Comments of Freeman Spogli & (continued...)

discussed below, Goldman supports these commenters. **None of the comments supported retaining the existing rules on attribution of limited partnership interests.**

A. Elimination of Insulation Requirement

M/C Partners, Fox and Freedom of Expression urged the Commission to delete the insulation requirement and make nonattributable any limited partnership interest recognized under a state limited partnership law. Even if the Commission retains the insulation criteria, M/C Partners commented that, at most, the Commission should make noninsulated limited partnership interests no more attributable than voting stock interests under the applicable benchmark standard.[6/]

Goldman agrees that attributing limited partnership interests, and not stockholding interests, unreasonably discriminates against those who, for tax reasons,[7/] choose to make equity investments in entities

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[5/] (...continued) Co., Incorporated ("Freeman Spogli"), pp. 5-12; Comments of M/C Partners, The Blackstone Group, and Vestar Capital Partners ("M/C Partners"), pp. 30-31.

[6/] The Comments of California Public Employees' Retirement System ("CalPERS"), at pp. 13-18, also advocate adoption of the same equity benchmark for noninsulated limited partnership interests as are applied to voting stock interests, including use of a "multiplier" in vertical ownership situations to reflect a party's attenuated interest in a licensee.

[7/] "In the case of many private institutional investors, the choice of business organization and capital (continued...)

formed as limited partnerships rather than corporations.[8] Why are limited partners subjected to special scrutiny and restrictions on activities and services they can perform for the limited partnership? No rational distinction supports attributing ownership to limited partners and not to corporate shareholders in the same circumstances.[9] Accordingly, Goldman supports making all limited partnership interests nonattributable, or, at least, eliminating the insulation requirement for minor limited partnership interests.

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[7] (...continued)
formation -- corporate or partnership -- is driven largely by tax considerations." CalPERS, p. 14 (citation omitted).

[8] Indeed, stockholders should arguably be subjected to closer scrutiny than limited partners. See Freeman Spogli at p. 15 ("[L]imited partners in investment partnerships typically wield less influence than minority shareholders in closely held corporations with comparable equity interests.")

[9] Goldman also supports the reverse application of this principle of parity or equal treatment in other comments. Voting shareholders who agree to be bound by insulation restrictions such as are imposed on limited partners should be able to qualify for nonattribution. See M/C Partners, p. 19.

B. Modification of Insulation Criteria

Goldman agrees with M/C Partners' comments that, if the FCC retains insulation criteria, it should clarify that:

1. where a limited partnership is a licensee, or holds a controlling interest in the licensee, limited partners may perform general services (i.e., not related to broadcast content) for the partnership, such as banking, insurance, legal and accounting services, real estate management, etc. (M/C Partners, p. 30);
2. if a limited partnership holds a noncontrolling interest in a licensee, no restrictions should apply to a limited partner's "involvement" with the licensee (Id. at p. 31); and
3. if a limited partner is an entity rather than an individual, limitations should not apply to officers or directors of the entity, nor to affiliates of the entity, unless they act on behalf of the entity in performing services for the licensee (Id.).

Goldman also concurs in Cap Cities/ABC's observations that, because officers and directors of a licensee's parent corporation (with "presumptive control" over a licensee) may be insulated from attribution when their duties and responsibilities are unrelated to the licensee's broadcasting functions, no rationale supports applying a stricter standard to limited partners (who presumptively do not have control over the licensee, because they do not participate in the governance of the licensee).[10/] Any prohibited services should directly relate to the core broadcasting activities affecting content of a limited partnership licensee, and not to those services, such as investment banking, insurance, etc., that are performed for any business.

V.

Ten Percent Shareholding Attribution Benchmark

Goldman supports the commenters[11/] who urge the increase of the shareholding attribution benchmark for voting stock from five percent to 10 percent.[12/]

10/ Cap Cities/ABC, pp. 11-12.

11/ Comments of The Capital Group, Inc. ("Capital Group"); CBS, p. 8; Freedom of Expression, pp. 5-6; INTV, pp. 3-5; and Comments of Tribune Broadcasting Company ("Tribune Broadcasting"), pp. 20-25.

12/ Goldman agrees with the Mid West Family Stations' Comments on Notice of Proposed Rulemaking ("Mid West") that the Commission's current attribution rules, focusing as they do on where actual legal control rests, best serve the goals of predictability, certainty and ease of processing, rather than any policy based on more nebulous concepts. Mid West, pp. 3-7. In response to the issue raised in the Attribution NPRM at ¶ 16, the Commission should retain benchmarks and specific attribution limits to enhance predictability and certainty, rather than using an ad hoc approach.

(continued...)

A. Raising the Benchmark Would Increase the Availability of Capital, Without Undue Risk

Investment bankers and their merchant banking activities, in particular, serve as financial intermediaries between individual and institutional investors, on the one hand, and companies that require capital, on the other. Investment banks fulfill this role by evaluating investment opportunities in light of their risk and return characteristics and by directing their own capital and that of investment funds on behalf of third parties to the most attractive investments. These investments are made to maximize the financial returns to Goldman and investors in the investment funds. The investment period is generally relatively short (an average of approximately five years) and often extends only to bridge the critical time before the company can access the broader capital markets. This capital raising function is especially critical to fund new or unproven technologies (such as will be the case, for example, when broadcasters convert their systems to Advanced Television or High Definition Television), to finance

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[12] (...continued)
Likewise, Goldman concurs with CBS' comments that it would be counterproductive for the FCC both to raise the benchmark for attributing voting stock interests and, at the same time, to adopt a multi-factor balancing test. CBS is correct that, to introduce such factors as individualized assessments of size or management composition of companies, or rights of minority shareholders, would bring uncertainty which discourages capital formation.

industry consolidation which promotes economic efficiencies, and to provide capital for companies to expand.

Goldman makes equity investments in a wide range of businesses, not just those engaged in broadcasting. When investing in corporate broadcast licensees, generally Goldman intentionally keeps its voting stockholding below the existing five percent benchmark to avoid attribution of ownership interests. Otherwise, a financial institution such as Goldman could become hopelessly entangled in ownership restrictions. The time and expense of business and legal personnel to analyze and conform to the applicable FCC restrictions deter any greater investments and help cause capital to be diverted to nonbroadcast investments.

Yet, the rationale for the Commission's restrictions does not apply to Goldman's investments. Like other investment bankers,[13/] Goldman is not interested in the types of day-to-day operations with which the Commission and its attribution rules are concerned. Such investors make broadcast investments for financial return only.[14/] Moreover, investment bankers invest not only for their own account, but also for investment funds on behalf of third party investors to whom they owe a fiduciary duty. These

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13/ See M/C Partners, pp. 13, 15.

14/ See M/C Partners, p. 19.

fiduciary obligations heighten the investment bankers' focus on financial return.

Unlike companies or persons primarily engaged in broadcasting or other competitive businesses, which may have strategic or competitive goals in making particular broadcasting investments (and, therefore, may well be interested in affecting core broadcasting operations), investment bankers have no interest in or incentive to exercise control over the core broadcasting operations of a licensee. Rather, Goldman focuses on maximizing the investment return.

Goldman is not the type of investor the FCC should be concerned about restricting. Rather, it is the rich source of needed investment capital that the Commission should be concerned about encouraging. Goldman can (and does) pursue many investment opportunities outside broadcasting. The FCC should not speculate about the interests investment banks might have arising from scattered broadcasting investments and enact rules to curb them. Otherwise, it runs the risk of foreclosing broadcasters from a vital source of capital or constricting it to a trickle.

Restrictive FCC regulations limit a broadcaster's ability to access necessary capital, particularly for companies not sufficiently well established to access the public capital markets.

B. Ten Percent SEC Standard, Rather than Five Percent, is the Appropriate Model

The attribution rules of other agencies support the benchmark increase to 10 percent. Goldman agrees with Capital Group that one relevant standard is the banking and thrift statutes (*e.g.*, 12 U.S.C. §§ 1481, *et seq.*) which presume the absence of control below 10 percent.

In adopting the present five percent benchmark in 1984, the FCC relied, in part, on § 13(d) of the Securities Exchange Act of 1934[15/], which uses a five percent benchmark. As explained below, this reliance is misplaced. The more analogous securities law benchmark would be the 10 percent benchmark customarily associated with actual control, as reflected, for example, in § 16 of the Securities Exchange Act of 1934.[16/]

The Williams Act added § 13(d) to the securities laws so that investors would have notice of attempts and plans to control a corporation by requiring the public filing of reports with the SEC and other entities. The reportable event triggering this requirement is the acquisition of more than five percent of the equity securities of a registered corporation. Initially, in 1968, the benchmark was 10 percent, but it was changed to cover acquisitions of more than five percent because they "*may*

15/ 15 U.S.C. § 78m(d).

16/ 15 U.S.C. § 78p.

lead to important changes in the management or business of the company and the shareholders should be fully informed." H.R. Rep. No. 1655, 91st Cong. 2d Sess. Reprinted in U.S.C.C.A.N. 5028 (emphasis added). "(T)he purpose of section 13(d) is to alert investors to *potential* changes in control, and to give them an opportunity to evaluate the effect of the potential change." SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1166 (D.C. Cir. 1978) (citation omitted) (emphasis in original). Under SEC rules, non-institutional investors must file a Schedule 13D which, under Item 4, requires disclosure of plans or proposals to acquire additional shares of a target's stock and of any intent to influence or control a potential target's management. Louis Loss and Joel Seligman, *Fundamentals of Securities Regulation* 512 (1995) ("Loss").

In 1984, the FCC referred to § 13(d) as the SEC's "stockholding" disclosure requirement for entities "holding" more than five percent of large publicly-traded corporation's stock.[17/] The statute, however, makes only the acquiring of stock a reportable event, not stockholding per se.

If the acquisition which gives a shareholder more than five percent is of less than two percent of the shares of a class within one year, the acquisition is exempted from the statute and does not create a reportable event.

[17/] Attribution Order at p. 1006.

§ 13(d)(5)(B). This means a 4.9 percent shareholder who, more than a year later, acquires 1.9 percent of the same class of equity securities does not have to report the acquisition, even though the shareholder then owns more than five percent.[18/]

Moreover, if a person owns more than five percent of a company when it becomes a public company, that person is not required to file a report under § 13(d) unless and until that person subsequently acquires additional securities. See § 13(d)(1), 15 U.S.C. § 78m(d)(1). The purpose of the statute is "to alert the marketplace of every *large, rapid aggregation or accumulation* of securities . . . which might represent a potential shift in corporate control" (GAF Corp. v. Milstein, 453 F.2d 709, 717 (2nd Cir. 1971), cert. denied, 406 U.S. 910 (1972) (emphasis added)) and not merely to report ownership.

Because § 13(d) is not concerned with control, but rather possible control in the future, it is not the securi-

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18/ Closely related to § 13(d) is § 13(g), enacted in 1977 (91 Stat. 1498), which gives the SEC discretion to require reporting by every person who is a five percent beneficial owner, regardless of when this status was achieved and regardless of the exemption for acquisitions totaling not more than two percent in 12 months. Under SEC implementing regulations, specified institutional investors acquiring securities "in the ordinary course of . . . business and not with the effect of changing or influencing the control of the issuer" file a short form report within 45 days after the end of the calendar year in which the investors exceed the five percent benchmark, as long as they still own more than five percent at the end of that calendar year. Rule 13d-1(b)(1).

ties law model to be applied in determining the appropriate benchmark for the attribution rules. More relevant, in this context, would be the 10 percent threshold which is commonly used by securities law practitioners as a benchmark for control, and which is reflected in, for example, § 16 of the Securities Exchange Act. "Control" is not defined in the Securities Exchange Act, and its existence depends upon all the facts and circumstances.[19/] As a matter of practice and consensus among the securities bar, however, 10 percent ownership is generally used as a practical benchmark below which -- absent other means of control such as voting agreements or a directorship -- control is thought not to exist.

Consistent with this practical approach, § 16 uses a 10 percent equity beneficial ownership benchmark for assessing the appropriate level to impose a reporting requirement. For purposes of recovering "insider trader" profits, § 16 treats the owner of more than 10 percent of a large, publicly-traded corporation's equity securities the same as if the stockholder were an officer or director of the corporation. The argument of the statute's proponents was that, at such a level of ownership, the stockholder has control or influence equivalent to that of a director. Peter J. Romeo and Alan L. Dye, *Section 16 Securities Exchange Act of 1934*, § 1.03 at 1-22 (1994); see also,

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[19/] See Loss at 448-455 (discussing cases).

S.Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934). In adopting implementing regulations, the SEC stated that "Section 16, as applied to ten percent holders, is intended to reach those persons who can be presumed to have access to inside information because *they can influence or control the issuer as a result of their equity ownership.*"[20/]

The FCC should use the same standard as the SEC in deciding when an investor may have the ability to control or influence programming, namely, 10 percent equity holding. The SEC and FCC goals are one and the same: to reach persons who can influence or control the company, albeit for different reasons.[21/] Moreover, adoption of a common 10

[20/] 1934 Act Release No. 28869 (February 8, 1991), p. 14 (emphasis added). Another commenter, The Investment Company Institute ("Inv. Co. Inst.") quotes this rule and, in so doing, acknowledges that § 16 deals with a subject closely analogous to that of the Commission's attribution rules.

[21/] In the Attribution Order, the Commission stated that § 16 was "intended to prevent intrinsically illegal or undesirable activities" and that the level of stock ownership identified in the rule "as carrying an appreciable risk of permitting such activities seem inappropriate" as a model for the FCC's attribution rules where "the activity at issue--influencing a licensee's programming decisions--is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation." 97 FCC 2d at 1010.

However, no such sharp distinction may be drawn between § 16 and the attribution rules. They operate in a similar fashion. The relevant portions of § 16 identify stockholders whose "short swing" stock trading (continued...)

percent benchmark can ease the burden (and heighten the level) of regulatory compliance. An investor can better conform his investment activities knowing that, across the legal spectrum, a common standard of control is used.

VI.

Nonvoting Stock and Debt Holding Nonattribution

Goldman, in its comments, supported retention of the policy that nonvoting stock is nonattributable. Goldman concurs in the ten other comments [22/] supporting the policy. Nonvoting stockholders should not have ownership attributed to them, because they have no input into the election of directors who oversee the corporation. As Goldman stated, and as supported by another commenter,[23/] the burden of proof should be on those who advocate change.

[21/] (...continued)
profits may be assumed to be based on insider information and subject to being divested. If no "short swing" stock trading profits exist, the mere achievement of the benchmark is not unlawful. Likewise, stockholding above FCC attribution rule benchmarks is not itself unlawful but, if it is accompanied by the holding of other attributable interests, the holder may be subject to divestiture requirements of the ownership rules.

[22/] Cap Cities/ABC, p. 9; CBS, pp. 14-15; Fox, pp. 14-17; Freedom of Expression, pp. 8-10; INTV, p. 7-8; M/C Partners, p. 21; Comments of National Broadcasting Company, Inc. ("NBC"), pp. 6-7; Silver King, p. 9, n. 8; Comments of Turner Broadcasting, Inc. ("Turner"), pp. 9-18; and Westinghouse, pp. 4-8.

[23/] M/C Partners, p. 14, n. 28.

Otherwise, proving that nonvoting shareholders do not exercise control over programming or other core broadcasting functions would force supporters of the policy to prove a negative.[24] **No commenters advocated abolishing or changing the policy of nonattribution of nonvoting stock.**

Goldman also agrees with the two commenters[25] who advocated that debt holding remain nonattributable. **No one urged attribution of debt holding.** M/C Partners is correct that the consequences of attributing debt would be to seriously restrict broadcasters' access to capital. Attributing ownership to banks would quickly foreclose them as financing sources. Goldman also concurs with M/C Partners' and Cap Cities/ABC's comments that making debt holding attributable would be impossibly complex for the FCC to oversee and to define an appropriate benchmark. As Cap Cities/ABC further comments, saddling debt holders with attribution without the benefits of ownership also would be unfair.

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[24] Id.

[25] Cap Cities/ABC, pp. 13-15; and M/C Partners, pp. 21-22.

VII.

Treatment of LLCs and RLLPs

The Commission raises the issue whether LLCs and RLLPs should be treated, for attribution purposes, as limited partnerships or as corporations. This issue begs the question of whether noninsulated limited partnerships should be subjected to attribution rules different from corporations. As discussed in Section IV, A, above, the Commission should abolish the distinction not based on a coherent rationale.[26/]

Should a distinction exist in the treatment of equity interests in the two entities, Goldman concurs with the three commenters[27/] who urged that LLCs be treated, for attribution purposes, as limited partnerships.

VIII.

Conclusion

The Commission's record unequivocally supports modification of certain portions of its attribution rules and retention of others. By adopting better standards and keeping those that work, the Commission will meet its goal

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26/ See CalPERS, p. 18 ("[T]he Commission should apply the same equity ownership benchmark to all the various forms of media investment implicated by the attribution rules -- voting stock, limited partnerships, and LLCs and RLLPs as well.")

27/ Cap Cities/ABC, pp. 12-13; M/C Partners, p. 31; and Freedom of Expression, pp. 12-14.

of making capital available to the broadcast industry under ownership and positional arrangements which involve minimal risk of undue outside influence over programming and core broadcasting activities. (Attribution NPRM ¶ 5) The revised and retained rules supported in the comments discussed above would also achieve the corollary objective of certainty, predictability and ease of processing. (Id.)

Respectfully submitted,

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Dated: July 10, 1995